New York Law Journal



# Court of Appeals Settles 'Cured Acknowledgments'; Contemporaneous vs. Simultaneous: Part I

On Dec. 16, 2021, the Court of Appeals, in 'Anderson v. Anderson' intelligently settled burning questions, which, for nearly 25 years, confounded bench and bar regarding acknowledgments in marital agreements.

By **Elliott Scheinberg** | January 05, 2022

**Elliott Scheinberg. Courtesy photo**

On Dec. 16, 2021, the Court of Appeals, in *Anderson v. Anderson*, 2021 NY Slip Op 07058 (2021), a decision by Judge Jenny Rivera, intelligently settled burning questions, which, for nearly 25 years, confounded bench and bar regarding acknowledgments in marital agreements: (1) must a party's signature be "contemporaneously" or "simultaneously" acknowledged; (2) is there an outer time limit; and (3) may an acknowledgment in a pre or postnuptial agreement be cured when both parties complied with the statutory formalities and, due to no fault of either, the language of the acknowledgment does not comply with the statutory formulaic (Real Property Law (RPL) 309-a; see *Weinstein v. Weinstein*, 36 A.D.3d 797 (2007)) by failing to recite that their identities were either proved to or known by the notaries.

**'Anderson' and 'Koegel'.** *Anderson* comprised two appeals, *Anderson v. Anderson*, 186 A.D.3d 1000 (4th Dept. 2020), and *Matter of Koegel*, 160 A.D.3d 11 (2d Dept. 2018). In *Anderson*, the husband timely signed the prenuptial agreement but did not have it

acknowledged until seven years later. In a 3-2 decision, the Fourth Department held that "when an acknowledgment is missing from a nuptial agreement, an acknowledgment and a reaffirmation by the parties is required to cure the defect." 186 A.D.3d at 1002

In *Matter of Koegel*, the decedent and the surviving spouse properly complied with the steps necessary for a certificate of acknowledgment; however, due to no fault of either, the notaries, who were their attorneys, failed to state that each party was personally known to him. The Second Department held that extrinsic evidence by both attorneys could and did cure the defects.

The Court of Appeals affirmed both.

The Court captured the issues:

> [I]n *Matisoff* we noted that "[Domestic Relations Law] [DRL] §236(B)(3) and the RPL do not specify when the requisite acknowledgment must be made in relation to the party's signature.
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> [T]hese appeals ... present ... two permutations of the central issue of whether non-compliance with the signature acknowledgment requirements of DRL §236(B)(3) renders a nuptial agreement irrevocably unenforceable. Anderson presents the question left open in *Matisoff v. Dobi*, 90 N.Y.2d 127 (1997), specifically whether the acknowledgment must be *contemporaneous* with the signing of the agreement in order to comply with DRL §236(B)(3).
>
> We conclude that the signature must be acknowledged *contemporaneously* within a *reasonable time of signing*. Because in Anderson the wife signed and acknowledged the agreement the month after the wedding, while the husband delayed nearly seven years before acknowledging his signature and did so shortly before he commenced a divorce action, the husband's acknowledgment is ineffective and the nuptial agreement unenforceable. The only remedy under the circumstances was for the parties to reaffirm the agreement's terms, which did not occur in this case.
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> In *Matter of Koegel*, the acknowledgment of each party [was] made contemporaneously with the signing of the nuptial agreement, but the certificates of acknowledgment were defective. The parties' lawyers failed to include in the respective certificates the undisputed fact that the signer was personally known to them at the time of signing. Where the signatories have satisfied the prerequisites for a valid certificate of acknowledgment—i.e., the defect in the certificate of acknowledgment is occasioned by the notary's or other official's error and not by a flaw in the parties' actual signing and acknowledgment—a reaffirmation of the agreement terms is unnecessary. Thus, this defect in the certificate may be overcome with extrinsic evidence of the official's personal knowledge or proof of identity of the signer.

**The three procedural formalities in DRL §236(B)(3) and in EPTL §5-1.1-A(e)(2).** DRL §236(B)(3) sets forth three procedural formalities necessary to validate a marital agreement: "[a]n agreement ... made before or during the marriage, *shall be valid and enforceable in a matrimonial action* if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded" (emphasis provided). A "waiver or release of a right of election", must, pursuant to EPTL §5-1.1-A(e)(2), "be in writing, subscribed by the maker thereof, and acknowledged or proved in the manner required for the recording of a conveyance of real property."

**Purpose of the acknowledgment.** "Two goals are fulfilled by an acknowledgment": "First, it 'serves to prove the identity of the person whose name appears on an instrument and to authenticate the signature of such person' (*Matisoff*, 90 N.Y.2d at 133 ...; *Galetta*, 21 N.Y.3d at 191-192). Second, it imposes on the person signing a 'measure of deliberation in the act of executing the document' (*Galetta*, 21 N.Y.3d 186, at 192 ...)." *Matter of Koegel*, 160 A.D.3d 11, 22 (2d Dept. 2018).

**An acknowledgment requires simultaneous compliance with multiple statutes.** An acknowledgment requires simultaneous compliance with multiple statutes. In *Galetta v. Galetta*, 21 N.Y.3d 186, 192 (2013). The Court explained that RPL §§292, 303, and 306 "must be read together to discern the requisites of a proper acknowledgment" in order to satisfy DRL §236(B)(3):

> Specifically, section 292 "requires that the party signing the document orally acknowledge to the notary public or other officer that [they] in fact signed the document" [], §303 requires that the notary or other officer taking the acknowledgment "knows or has satisfactory evidence[ ] that the person making it is the person described in and who executed such instrument" (... quoting RPL §303), and §306 "compels the notary or other officer to execute 'a certificate ... stating all the matters required to be done, known, or proved' and to endorse or attach that certificate to the document" (... quoting RPL §306).

See *Matisoff*, 90 N.Y.2d at 132-33.

**Purpose of the certificate of acknowledgment.** "The purpose of the certificate of acknowledgment is to establish that these requirements have been satisfied: (1) that the signer made the oral declaration compelled by RPL §292; and (2) that the notary or other official either actually knew the identity of the signer or secured 'satisfactory evidence' of identity ensuring that the signer was the person described in the document." *Galetta*, 21 N.Y.3d at 192. Furthermore:

> ... The acknowledgment also "necessarily imposes on the signer a measure of deliberation in the act of executing the document" (*Galetta*, 21 N.Y.3d at 192 ...). And because "[m]arital agreements within [DRL] §236(B)(3) encompass important personal rights and family interests[,] ... the formality of acknowledgment

> underscores the weighty personal choices to relinquish significant property or inheritance rights, or to resolve important issues concerning child custody, education and care" (*Matisoff*, 90 N.Y.2d at 136 ...).
>
> Put another way, a couple's decision to be bound by the terms of a nuptial agreement is necessarily based on their understanding of each other's respective economic status and their future as a couple at the time they sign the agreement, and the formalities are intended to impress upon the signatories the consequences at the moment of affirmation. To serve their intended purpose, these formalities must be completed close in time to when each party weighs the consequences of their respective decisions and signs.

**Typographical error charged against the husband.** The last time the Court of Appeals weighed in on the issue of acknowledgments in marital agreements was in *Galetta*. Therein the parties executed a prenuptial agreement before different notaries at different times one week ahead of their wedding. Unchallenged were the authenticity of their signatures and the procedural circumstances of the signing. While the certificate of acknowledgment relating to the wife's signature contained the proper language, the certificate in the acknowledgment relating to the husband's signature, which was prepared by the same typist, failed, due to oversight, to indicate that the notary "confirmed the identity of the person executing the document or that the person was the individual described in the document." In her divorce action, the wife moved for summary judgment for a declaration that the agreement was unenforceable because the certificate of acknowledgment relating to the husband's signature did not comply with the Real Property Law.

The husband argued that the language of the acknowledgment substantially complied with the Real Property Law. He also submitted an affidavit from his notary stating that he was an employee of a local bank where the husband did business, and that it was the notary's *custom and practice*, prior to acknowledging a signature, to confirm the identity of the signer and assure that the signer was the person named in the document. The notary added that "he presumed he had followed that practice before acknowledging the husband's signature."

Supreme Court denied the wife's motion, finding substantial compliance with the Real Property Law. A divided Fourth Department (3-2) affirmed on the different ground that, although the acknowledgment was defective, the deficiency could be cured after the fact and that the notary's affidavit raised a triable issue of fact as to whether the agreement had been properly acknowledged when executed.

The Court of Appeals (21 N.Y.3d at 193) determined that without stating "'to me known and known to me,'" the certificate failed to indicate either that the notary knew the husband or had ascertained through some form of proof that the husband was the person described in the prenuptial agreement," thereby rendering the certificate of acknowledgment "defective".

The Court of Appeals (21 N.Y.3d at 197) opted to "not definitively resolve the question of whether a cure is possible because, similar to what occurred in *Matisoff*, the proof submitted (in *Galetta*) was insufficient"; in his affidavit, the notary did no more than recognize his own

signature without having any independent recollection of notarizing the prenuptial agreement for which reasons the husband could not rely on the notary's custom and practice to fill in the evidentiary gaps because "the averments presented by the notary public [we]re too conclusory to fall into this category."

Notably, the Court emphasized (at 198) that had the notary recalled acknowledging the husband's signature, "he might have been able to fill in the gap in the certificate by averring that he recalled having confirmed [the husband's] identity, without specifying how." However, since the notary was attempting to rely on custom and practice evidence "it was crucial that the affidavit describe a specific protocol that the notary repeatedly and invariably used—and proof of that type is absent here."

**'Anderson': 'timely acknowledgment ensures the consequences of the agreement are meaningfully impressed upon the signatories'.** Candy Anderson signed and acknowledged a nuptial agreement with Jack Anderson the month after their wedding. His signature was not acknowledged until nearly seven years later, shortly before he commenced a divorce action. Candy also filed for divorce and moved for summary judgment to set aside the agreement. Supreme Court denied her motion. Candy appealed. In a 3-2 decision, the Fourth Department reversed because Jack's signature had not been contemporaneously acknowledged and the parties had not reaffirmed the agreement when the signature was acknowledged, thereby rendering the agreement invalid and unenforceable (186 A.D.3d 1000, at 1002-03). The dissenting justices would have held that because DRL §236(B)(3) is silent on this question, the court was without authority to impose such requirements.

On appeal to the Court of Appeals, Jack argued that the acknowledgment was statutorily compliant because DRL §236(B)(3) regardless of when this is done. Candy opposed citing *Matisoff v. Dobi*, 90 N.Y.2d 127 (1997), arguing, inter alia, that a contemporaneous acknowledgment places couples and counsel on clear notice of the prerequisites to ensure a valid agreement.

**'An acknowledgment must be executed contemporaneously, although not necessarily simultaneously'.** The Court of Appeals, in *Anderson*, held:

> A court is not at liberty to permit a post hoc remedy to an unacknowledged nuptial agreement. The legislature has expressed the mandatory nature of the acknowledgment requirement by "the unambiguous statutory language of DRL §236(B)(3), its history and related statutory provisions" (*Matisoff*, 90 N.Y.2d 127, at 135 ...). Moreover, the acknowledgment requirement is "onerous" and "more exacting than the burden imposed when a deed is signed" because, unlike an unrecordable, unacknowledged deed, which may be enforced against the grantor and grantee, an unacknowledged nuptial agreement is unenforceable against the parties to the agreement, "even when the parties acknowledge that the signatures are authentic and the agreement was not tainted by fraud or duress" (*Galetta*, 21 N.Y.3d at 192, citing *Matisoff*, 90 N.Y.2d at 134-135).

* * *

As is obvious from our reservation of the question in *Matisoff*, our view then, as it is now, is that statutory silence is not dispositive of the timing question. Thus, we must apply our well-established rules of interpretation to resolve the issue. "In matters of statutory interpretation, our primary consideration is to discern and give effect to the Legislature's intention" (*Rodriguez v. City of New York*, 31 N.Y.3d 312, 317 (2018) (quotations and citation omitted); McKinney's Cons. Laws of NY, Book 1, Statutes §92). Given the purpose of the signing and acknowledgment requirements, the DRL's "obvious spirit and intent" must be understood to require an acknowledgment that is reasonably close temporally to the period when the signing parties have considered the consequences of the nuptial agreement and decided to be bound by its terms. (*Matisoff*, at 133, quoting *Chamberlain v. Spargur*, 86 N.Y. 603, 606 (1881); McKinney's Cons. Laws of NY, Book 1, Statutes §§71, 96).

Indeed, the legislature intended to allow only those nuptial agreements that contained terms that were "*Fair and Reasonable*" (Sponsor's Mem, Bill Jacket, L 1980, ch. 236 (internal emphasis)). The affirmation solemnizes the consequences of signing the nuptial agreement. Thus, a rule recognizing a reasonable time frame for compliance with the acknowledgment requirement furthers that purpose. Because a nuptial agreement is not enforceable until both parties have signed and their signatures have been duly acknowledged, a significant delay between a signature and acknowledgment calls into question whether there was a shared understanding of the relevant circumstances.

*We therefore hold that an acknowledgment must be executed contemporaneously, although not necessarily simultaneously, with the party's signing of the agreement.* Otherwise, the document must be treated as legally and functionally unacknowledged. Requiring that signatures and acknowledgments be formalized within a reasonable time period does not force an acknowledgment to occur at the moment that a party signs the document or at the same time the other party signs and acknowledges the document. While necessary to effectuate the legislative purposes of the acknowledgement requirement, this approach does not preclude execution in counterparts and accounts for a reasonable delay between signing and acknowledgment, which might be occasioned by circumstances unrelated to a party's knowing delay or intent to gain leverage over the other party. For example, a brief lapse in time between the signing and the acknowledgment before a notary or other official is reasonable when the official is not immediately available, such as during holidays and vacations or a party suffers from an illness or is unable to obtain time off from work.

A document that depends on an untimely acknowledgment is the legal and functional equivalent of an unacknowledged document. However, in a case involving such a document, the parties are not without a remedy. When there is an excessive delay rendering an acknowledgment ineffective and the agreement therefore unenforceable, the parties are free to reaffirm their agreement, again based on the information available to them at that time. To comply with DRL §236(B)(3),

> reaffirmation would require that both parties must again sign and acknowledge the agreement. The rule thus places the parties on a fair and equal footing in deciding whether to be bound by the agreement—either initially or at some future date if the agreement is unenforceable because of the delay.
>
> If we adopted the rule advocated by Jack, we would encourage a party to withhold acknowledgment and would allow that party to wait until they can reassess the terms based on changed economic standing and unanticipated events. Permitting Jack's unreasonably delayed commitment would be at odds with the purpose of an antenuptial agreement under which both parties consider terms that are designed based on their respective personal and professional lives at the time of execution and their predictions of their future together, and not on actual events that transpire years into the marriage, including later economic success or failure.

**The Court declined to fix temporal 'outer boundaries', nonexhaustive factors.** The Court rejected fixing a hard timeline, rather leaving it to the lower courts based on a nonexhaustive list of considerations surrounding each set of events:

> We need not set forth the outer boundaries of the time in which the signature must be acknowledged. In those cases where an acknowledgment is challenged as too late to be compliant with DRL §236(B)(3), and the parties have not reaffirmed the agreement, resolution of the challenge requires the same exercise of judicial decision making as with any other disputed issue presented to a court. In such cases, a court may consider as relevant factors in its determination the length of the delay, whether the signer or a third party caused the delay, and whether the signer is motivated to comply with the statutory mandates because of changed circumstances in the marriage or an impending divorce action. These factors are not exhaustive, but represent the type of considerations that evince a strategic or unreasonable delay, rather than delay due to unintended circumstances.
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> * * *
>
> Indeed, by retaining unilateral power to validate the agreement years later, Jack sought the benefit of what he and Candy did not bargain for—an option without time limit and which he alone could exercise, including shortly before the commencement of a divorce action ... [W]hile Candy believed she was entering into a contract based on a shared understanding of the relevant facts, that understanding was essentially lacking as the circumstances were quite different seven years later when Jack finally attempted to formalize the agreement by acknowledging his signature.

From an historical perspective, in *Holbrook v. New Jersey Zinc Co.*, 57 NY 616, 616-17 (1874), the Court ruled:

> Under the provisions of the act of 1833 relative to proceedings in suits, etc. (§9, chap. 271, Laws 1833), authorizing the acknowledgment and proof of written instruments, except bills, notes and wills, in the same manner as conveyances of real estate, an assignment of and power of attorney to transfer stock, duly acknowledged by a subscribing witness, is competent evidence of the transfer, and the acknowledgment may be made at any time before the paper is offered in evidence.

Part II addresses the following: *Koegel* throughout all judicial levels; unacknowledged agreements remain enforceable in nonmatrimonial actions; methodology of acknowledgment vs. evidence of proper acknowledgment; and evidence of acknowledgment by a subscribing witness.

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# Court of Appeals Settles 'Cured Acknowledgments'; Contemporaneous vs. Simultaneous: Part II

This second part of a two-part article addresses 'Koegel' throughout all judicial levels; unacknowledged agreements remain enforceable in nonmatrimonial actions; methodology of acknowledgment vs. evidence of proper acknowledgment; and evidence of acknowledgment by a subscribing witness.

By **Elliott Scheinberg** | January 06, 2022

**Elliott Scheinberg. Courtesy photo**

Part I addressed the landmark decision, *Anderson v. Anderson*, 2021 NY Slip Op 07058 (2021), which addressed two appeals, *Anderson v. Anderson,* 186 A.D.3d 1000 (4th Dept. 2020), and *Matter of Koegel*, 160 A.D.3d 11 (2d Dept. 2018), regarding contemporaneous and simultaneous acknowledgments of marital agreements, affirming both appellate courts. It also reviewed: the purpose of the acknowledgment; the requirements of an acknowledgment; and the purpose of the certificate of acknowledgment. Part I also examined *Galetta v. Galetta*, 21 N.Y.3d 186 (2013), the most recent pronouncement by the Court of Appeals on the issue of acknowledgments and marital agreements.

**'Matter of Koegel'.** Irene and William Koegel signed a prenuptial agreement approximately one month before their marriage, wherein they waived all their respective rights of election as surviving spouses in order to benefit their children from previous marriages. The agreement confirmed their knowledge of the "approximate extent and probable value of the estate of the other." *Matter of Koegel*, 160 A.D.3d 11, 13 (2d Dept. 2018).

Both parties signed the agreement at the bottom of the first page. The second page contained certificates of acknowledgment of each signature, each signed by their respective attorneys as notaries. William's acknowledgment read, "On (date) ... before me personally appeared William F. Koegel, one of the signers and sealers of the foregoing instrument, and acknowledge the same to be his free act and deed." The language in Irene's acknowledgment mirrored William's. Significantly, although both lawyers had long known their clients, neither acknowledgment attested to whether William or Irene was known to their attorney-notaries.

Irene received benefits from William's will, including a possessory interest in the Somers condominium, with a date-of-death value of $628,285, and its contents (appraised value $29,660); a 50% interest in the Vero Beach condominium, having a 50% date-of-death value of $275,000, and its contents; sole interest in an IRA, having a principal value of $116,497; an annuity having a principal balance at death of $129,004; lifetime benefits from a charitable remainder trust benefitting Williams College, having a date-of-death principal value of $131,129; an automobile valued at $10,500, etc.

William died after 29 years of marriage. As executor of his estate, John, William's son, filed a petition to probate William's last will and testament, which referenced the agreement, that "[t]he bequests to and other dispositions for the benefit of [Irene] contained in this Will [we]re made by [him] in recognition of and notwithstanding said antenuptial agreement," and that the will controlled in case of any inconsistencies, but in all other respects the "antenuptial agreement shall be unaffected by this Will."

It cannot possibly come as any surprise that Irene greedily pounced on the opportunity to elect against the estate, arguing that the certificate of acknowledgment was materially defective because the acknowledgment omitted mandatory language attesting that the notary knew the signer or ascertained through some form of proof that the signer was the person described—that there is no legislative authorization to permit a cure of a material defect. John countered that *Galetta* strongly suggested that extrinsic evidence should be admissible to show that "the prerequisites of an acknowledgment occurred but the certificate simply failed to reflect that fact." 21 N.Y.3d at 197.

John filed a petition to invalidate Irene's election and for a declaration that she was not entitled to the statutory share because, inter alia, of the separate affirmations from each lawyer who had acknowledged the signing; Irene's lawyer affirmed that he recalled taking the acknowledgment of her signature and that she did not need to provide proof of identification because he had known her based on a prior professional relationship, and William's lawyer/law partner affirmed the self-explanatory basis of his knowledge of William's identity. The Surrogate determined that the affidavits sufficiently cured the defect and denied Irene's motion.

**Appellate Division.** Noting that the Court of Appeals, in *Galetta v. Galetta*, 21 N.Y.3d 186, 197 (2013), had declined to "definitively resolve the question of whether a cure is possible," the Second Department, in a well-reasoned decision by Justice Leonard Austin, *Matter of Koegel*,

160 A.D.3d 11 (2d Dept. 2018), affirmed, concluding that the defect could be and was cured by John's submissions. The Court of Appeals granted Irene leave to appeal.

**The Court of Appeals**: **'A defective certificate of acknowledgment is not always fatal'.** The Court noted:

> EPTL 5-1.1-A provides that the waiver of the surviving spouse's elective share must "be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property" (EPTL 5-1.1-A (e) (2)). Given the similarity in language between DRL §236(B)(3) and the EPTL, and the respective conditions that the agreement and spousal waiver accord with the recording statutes, our analysis of DRL §236(B)(3) applies with equal force to Irene's appeal. However, the different contexts and circumstances surrounding the Koegel signatures and acknowledgments require a different outcome, that the statutory spousal share waiver was enforceable against Irene.
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> Unlike *Anderson*, *Koegel* involves defective written certificates of acknowledgment. As we have previously stated, "New York courts have long held that an acknowledgment that fails to include a certification ... is defective" (*Galetta*, 21 N.Y.3d at 193 ... citing *Fryer v. Rockefeller*, 63 N.Y. 268 (1875) (holding, under prior RPL §303, that acknowledgment of the deed that did not establish signer's identity and relationship to document was invalid).
>
> In *Galetta* we noted that the lack of an acknowledgment means that the intended purpose, "to impose a measure of deliberation and impress upon the signer the significance of the document[,] ... has not been fulfilled" (21 N.Y.3d at 196). This failure thus justifies the "sound" rule "precluding a party from attempting to cure the absence of an acknowledgment through subsequent submissions" (id.).
>
> In dicta, *Galetta* raised the possibility that a defective, as opposed to an absent, acknowledgment could be cured, recognizing the compelling argument that in a case "where the signatures on the prenuptial agreement are authentic, there are no claims of fraud or duress, and the parties believed their signatures were being duly acknowledged but, due to no fault of their own, the certificate of acknowledgment was defective or incomplete," the agreement should be upheld.
>
> Resolution of Irene's appeal requires that we answer the question hypothesized in *Galetta*: whether a defective acknowledgment may be overcome by proof of the occurrence of the events anticipated by the statutory mandates.
>
> We now adopt the reasoning in *Galetta* that the defect identified there and presented in *Koegel* may be overcome with adequate evidence that the statutory requirements were met, even if the acknowledgment is not properly documented in the first instance. This limited remedy avoids invalidating a nuptial agreement when the parties have done all that the DRL requires of them: the signature and

> acknowledgment may satisfy the statutory mandates if extrinsic evidence supports "that the acknowledgment was properly made in the first instance" even if the certificate fails to "include the proper language" due to the notary's or other official's error (*Galetta*, 21 N.Y.3d at 196-197).
>
> Permitting the parties to overcome this defect is not prohibited by the DRL, and, in fact, furthers the legislative purpose behind New York's nuptial agreement formalities by holding parties to their agreements when they signed and had their signature acknowledged before a person who knows them or who has proof of their identification.
>
> ... We hold that only in those limited cases where the parties signed and properly acknowledged the agreement can they later seek to present evidence of their prior timely compliance.
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> *Irene's and William's acknowledgments were defective, as opposed to absent*. The unrebutted affidavits of the notaries who witnessed the signatures showed that the parties' attempt to comply with the acknowledgment requirement was defective "due to no fault of their own" (*Galetta*, 21 N.Y.3d at 196), because the signatories did everything they were supposed to do and complied with the formalities, even though the acknowledgment certificates failed to articulate that compliance in writing.
>
> Accordingly, allowing proof of the personal knowledge of the signers merely allows John "to conform the certificate to reflect th[e] fact" (*Galetta*, 21 N.Y.3d at 197) of the actual events. Irene admitted that the lawyer to whom she acknowledged her signature was historically known to her from a previous professional relationship, the evidence overcame the non-compliance with the statutory mandates.

**Methodology of acknowledgment v. evidence of proper acknowledgment.** Methodology of an acknowledgment is wholly distinct from the rules of evidence, the core foundation of the legal system. Compliance with methodology creates the jural right; evidence establishes that the methodology was properly complied with. *Anderson* logically concluded that there is no foundation that supports the notion that statutory purpose is violated when a party is given an opportunity to present evidence or proof of proper compliance.

In *In re Saperstein*, 254 A.D.2d 88 (1st Dept. 1998), the surviving husband brought an application for permission to file late notice of election against the estate of his deceased wife. The surrogate dismissed the application. The Appellate Division affirmed:

> While there was no acknowledgment by the subscribing spouse during the decedent's lifetime—and any attempt to manufacture such an acknowledgment post mortem would be ineffective ... the waiver is nonetheless susceptible of being "proved" in the manner required for the recording of a conveyance of real property, [per] RPL §304. The proof of execution prepared after the decedent's death by the

> attorney who signed the waiver as a subscribing witness is sufficient to comply with RPL §304 ... As the subject waiver was, accordingly, valid, petitioner's application to elect against his spouse's estate was properly dismissed.

**Unacknowledged agreements remain enforceable between the parties in nonmatrimonial actions.** Regarding the procedural formalities in DRL §236B(3), the Court, in *Anderson,* stated:

> Moreover, the acknowledgment requirement is "onerous" and "more exacting than the burden imposed when a deed is signed" *because, unlike an unrecordable, unacknowledged deed, which may be enforced against the grantor and grantee, an unacknowledged nuptial agreement is unenforceable against the parties to the agreement*, "even when the parties acknowledge that the signatures are authentic and the agreement was not tainted by fraud or duress." (*Galetta*, 21 N.Y.3d at 192, citing *Matisoff*, 90 N.Y.2d at 134-135).

However, the three procedural formalities in §236(B)(3) specifically target agreements sought to be enforced in "a marital action," not in other actions:

- *Mojdeh M. v. Jamshid A.*, 36 Misc.3d 1209(A) (N.Y. Sup. Ct. 2012): Pursuant to Iranian custom, parties negotiate and sign a "mehrieh," a marital contract, wherein money is paid or a gift is given to the bride from the groom. The parties agreed on 1,000 coins and other gifts. The court found that the mehrieh constituted a valid enforceable agreement. However, due to the absence of an acknowledgment or other manner required to entitle a deed to be recorded, it was held unenforceable as a marital agreement. Nevertheless, the wife's separate plenary action to enforce for breach of contract was permitted to stand. Since the appellant's companion action for a divorce was dismissed prior to the trial of this action, there was no impediment to enforcement in a contract.
- *Moran v. Moran*, 77 A.D.3d 443 (1st Dept. 2010): In this plenary action commenced to enforce a provision of a separation agreement prior to commencement of a divorce action, the husband moved for an order appointing a receiver to effect the sale of the marital residence. Plaintiff properly commenced a plenary action to enforce the separation agreement, since no matrimonial action was then pending (*Singer v. Singer*, 261 A.D.2d 531 ...).
- *In re Estate of Sbarra*, 17 A.D.3d 975, 976 (3d Dept. 2005): Respondent asserts that, although she signed the separation agreement, she did not acknowledge her signature to the notary who signed it later, making it unenforceable as a waiver of her rights to decedent's pension plan and other assets. We cannot agree. *A separation agreement must be properly acknowledged only in order to be enforceable in a matrimonial action* (DRL §236(B)(3); *Matisoff v. Dobi*, 90 N.Y.2d 127, 135 (1997) ). Since respondent does not deny that she signed the agreement and it survived the judgment of divorce, *the agreement is enforceable in other types of actions despite the alleged insufficiency of the acknowledgment.*

- *Singer v. Singer*, 261 A.D.2d 531, 532 (2d Dept. 1999): Contrary to the appellant's contention, the separation agreement was enforceable as an independent contract in this plenary action commenced by the plaintiff (General Obligations Law §§3-309, 3-313(2); *Rainbow v. Swisher*, 72 N.Y.2d 106, 109 ...). Although the agreement would not be enforceable as an "opting out" agreement in a matrimonial action because it was not acknowledged (DRL §236(B)(3); *Matisoff v. Dobi*, 90 N.Y.2d 127 ...), the action at bar was commenced to recover damages, inter alia, for breach of contract. Since the appellant's companion action for a divorce was dismissed prior to the trial of the action at bar, we find no impediment to enforcement in a contract action of the provisions of the parties' agreement insofar as it concerns their personal property and certain monetary obligations.
- As pertinent here, the parties, in *Goldman v. Goldman,* 118 A.D.2d 498 (1st Dept. 1986), entered into a reconciliation agreement wherein plaintiff withdrew and discontinued her divorce action, with prejudice, in consideration of a transfer of substantial assets to her. The agreement further provided that a more formal agreement would follow but, if it did not, "this memorandum shall constitute a final and binding agreement." The agreement was signed by both parties and their attorneys and the parties' signatures were *notarized*. The wife's second cause of action, in her action to set aside the agreement, alleged that the agreement as unenforceable under DRL §236B(3). The First Department held (118 A.D.2d at 500): "[T]he second cause of action as couched is legally insufficient. DRL §236B(3) expressly applies to the validity and enforceability of certain agreements '*in a matrimonial action*', which is defined in §236B(2). This is not a matrimonial action since plaintiff does not seek separation, divorce, annulment, a declaration of the validity or nullity of a marriage, maintenance or a distribution of marital property. Although the statutory standard in DRL §236B(3) is inapplicable here, traditional common law standards do apply to test the validity and enforceability of the agreement."
- *Geiser v. Geiser*, 115 A.D.2d 373, 374 (1st Dept. 1985): While a separation agreement which has not complied with the legislative mandate as to acknowledgment would not constitute the basis for a divorce action (DRL §170(6) ) "as to the parties themselves, the instrument ... may be effective without any acknowledgment ... and may be the proper basis for other action." (*Cicerale v. Cicerale*, 85 Misc.2d 1071, 1075-1076, affd. 54 A.D.2d 921).
- *Cicerale v. Cicerale*, 85 Misc.2d 1071, (Sup. Ct., Queens Co.), aff'd, 54 A.D.2d 921 (2d Dept. 1976): It is true that as to the parties themselves, the instrument as a "separation agreement" may be effective without any acknowledgment, and may be the proper basis for other action, but not one for a (conversion) divorce where it has not complied with the legislative mandate for it to constitute a basis for divorce (citing *Turner v. May*, 202 Misc. 320 (Sup. Ct., Columbia Co. 1952)).

**Evidence of acknowledgment by a subscribing witness.** A deed or instrument of conveyance may also be acknowledged alternatively by a person who witnessed the execution and who subscribed the conveyance as a witness (RPL §§292, 304). Even the notary who

acknowledged the signature may be a subscribing witness. *In re Estate of Menahem*, 16 Misc. 3d 1125(A) (Sur. Ct., Kings Co. 2007), aff'd, 63 A.D.3d 839 (2d Dept. 2009), citing *In re Felicetti*, N.Y.L.J., 1/22/98, p. 31; *In re Beckford*, 280 A.D.2d 472 (2d Dept. 2001) (deposition testimony of the attorney who notarized the spouse's signature on the prenuptial agreement created an issue of fact as to whether waiver of right of election is valid).

In *Davin v. Isman*, 228 N.Y. 1 (1920), the appeals court upheld a late acknowledgment where (1) the area following the signature of the subscribing witness upon the assignment contained an unexplained acid erasure of a signature, (2) the second page also contained an unexplained blank acknowledgment filled in by the decedent but not acknowledged by him, and (3) the subscribing witness did not acknowledge the execution of the assignment until over one year later. The acknowledgment by the subscribing witness was sufficient to authorize the recording of the instrument in the absence of any formal acknowledgment by the decedent: "No question is made that the signature of the subscribing witness appearing on the instrument was other than genuine. Upon the acknowledgment by a subscribing witness the instrument was complete so as to enable the holder of the same to have it recorded. RPL §304. A second subscribing witness was unnecessary. The fact that an erasure appears under the name of the subscribing witness does not in any degree change the language, terms, identity, or character of the instrument signed by Mr. Lilly, and was clearly an immaterial erasure, which defendant was not called upon to explain or account for."

In *In re Maul's Estate*, 176 Misc. 170, aff'd, 262 A.D. 941 (4th Dept. 1941), aff'd, 287 N.Y. 694 (1942), cited in *Matisoff,* the decedent executed a codicil to his will on the same day of the marriage, granting certain benefits to his wife. The new bride also executed an instrument wherein she waived the right to elect against the decedent's estate. While no certificate of acknowledgment had been attached, the signatures of two witnesses appeared after her signature. At trial, one of the witnesses, testifying under the compulsion of a subpoena permitting compelled testimony (RPL §305), stated that the widow signed the waiver in his presence and gave the information about himself required by RPL §304 (Proof by Subscribing Witness) for execution of a conveyance, following which the surrogate, relying on *Davin v. Isman*, affixed a certificate of acknowledgment and determined that the widow had waived her right of election.

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